Supreme Court, U.S.
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No. 09-386

IN THE

Supreme Court of the United States

AMBRACO, INC. and
GREAT AMERICAN INSURANCE COMPANY

Petitioners,

v.

M/V CLIPPER FAITH, her engines, tackle, apparel, furniture, etc., *in rem*, and BOSSCLIP B.V., DOCKENDALE SHIPPING CO., LTD., and FAITH SHIPPING COMPANY, LTD., *in personam*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition when the Fifth Circuit's Opinion affirming the District Court's enforcement of the forum selection and jurisdiction clauses at issue does not conflict with a decision of this Court or any Court of Appeals.

II. Whether Petitioners have presented compelling reasons to grant the Petition when the Fifth Circuit's Opinion, findings that English courts will apply the regulations set under the Carriage of Goods by Sea Act (hereinafter "COGSA"), 46 U.S.C. § 1301, as required by the controlling contract of carriage, does not conflict with a decision of this Court or a Court of Appeals.

RULE 14.1(B) STATEMENT

A list of all Parties to the proceeding in the Court whose judgment is the subject of this Petition is as follows.

Plaintiff-Appellants and Petitioners:

Ambraco, Inc. (hereinafter "Ambraco") and Great American Insurance Company (hereinafter "Great American").

Defendants-Appellees and Respondents:

M/V CLIPPER FAITH, her engines, tackle, apparel, furniture, etc., *in rem*, Bossclip B.V. (hereinafter "Bossclip"), Dockendale Shipping Company, Ltd. (hereinafter "Dockendale"), and Faith Shipping Company, Ltd. (hereinafter "Faith").

RULE 29.6 STATEMENT

None of the Respondents has a parent company and no publicly held corporation owns 10% or more of any such corporate Respondent.

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JURISDICTIONAL STATEMENT

Respondents agree with the Petitioners' Jurisdiction Statement.

STATEMENT OF THE CASE

This is a suit for alleged cargo damage brought by Ambraco, Inc. ("Ambraco") and its insurance company, Great America Insurance Company ("Great America"). (USCA5 17).

The M/V CLIPPER FAITH is an ocean-going general cargo vessel owned by Faith Shipping Company, Ltd ("Faith"). (USCA5 34). Dockendale Shipping Company, Ltd ("Dockendale") manned the vessel. *Id.* Bossclip, B.V. ("Bossclip") was the time charter of the vessel. *Id.* Bossclip contracted for the carriage of a cargo of bailer twine from Cabedelo, Brazil, to New Orleans, Louisiana, aboard the CLIPPER FAITH. *Id.* In connection with this carriage, Bossclip issued seventeen bills of lading. (USCA5 113-128). These bills identify Bossclip as the carrier, Cia. Sisal do Brasil as the shipper, and Ambraco as the consignee. *Id.* All seventeen bills had identical terms and conditions, including a forum selection clause mandating that all disputes be resolved in the High Court of Justice in London, England. (USCA5 130).

The CLIPPER FAITH arrived in New Orleans on or about February 2, 2006, at which time her hatches were opened and damage was allegedly discovered to the bailer twine cargo. (USCA5 47). Subsequently, on November 14, 2006, an original complaint was filed on

behalf of the Petitioners, Ambraco and Great American (referred to collectively as "Ambraco") in the District Court. (USCA5 17). On December 14, 2006, the named *in personam* appellees, Bosselip, Dockendale, and Faith (referred to collectively as "Vessel Interests"), timely submitted responsive pleadings, raising the appropriate defenses, including, but not limited to, improper venue. (USCA5 33). This defense was based on the valid forum selection clause contained in the contracts of carriage between the parties. *Id.*

On March 3, 2007, a supplemental and amended complaint was filed on behalf of Ambraco, naming Pacorini Holding, L.L.C. ("Pacorini") as an additional defendant. (USCA5 46). Pacorini was the stevedoring company hired by Bosselip to discharge the CLIPPER FAITH. *Id.*

On April 26, 2007, a motion to dismiss for improper venue under Rule 12(b)(1) and/or Rule 12(b)(3) of the Federal Rules of Civil Procedure was submitted on behalf of Vessel Interests. (USCA5 100). Ambraco timely opposed this motion. (USCA5 145). On May 24, 2007, the District Court, through an Order and Reasons, granted the motion, holding that the controlling forum selection clauses contained in the applicable bills of lading are binding and enforceable. (USCA5 231-240). The District Court found that Ambraco had offered no evidence of substantive differences between the laws of England and of the United States that would deprive Ambraco of a remedy or that would relieve or lessen the liability of the Vessel Interests. *Id.* Further, the District Court noted correctly that there is ample precedent accepting England as an adequate forum in

cases where English forum selection clauses were challenged in United States courts. *Id.* The District Court, therefore, dismissed Vessel Interests with prejudice. *Id.* A Judgment was issued the following day. (USCA5 241).

On June 6, 2007, a motion to alter/amend judgment and/or motion for new trial was submitted by Ambraco. (USCA5 242). With this motion, Ambraco submitted for the first time the affirmation of Mr. Mark Andrew Lloyd, Ambraco's English solicitor, to support its argument that England would be an unfair forum because it may deprive Ambraco of both its ability to recover from Bossclip and Dockendale and its *in rem* claim against the vessel. (USCA5 693-706). On July 11, 2007, after oral arguments, the District Court denied Ambraco's motion, affirmed the dismissal of Vessel Interests, with prejudice, but retained jurisdiction in order to ensure that the English court's ruling would not be contrary to U.S. public policy. (USCA5 606).

On July 18, 2007, rather than seeking its own dismissal for improper venue as a beneficiary to the applicable contracts of carriage, Pacorini, whose counsel had been present at the earlier oral arguments, submitted an answer to the supplemental and amended complaint and further filed a third-party complaint under Rule 14(c), naming the Vessel Interests as third-party defendants. (USCA5 607-618). Pacorini's pleading was clearly an attempt to make an "end-run" around the District Court's previous Judgment by tendering Vessel Interest directly to Ambraco even though the District Court had already found that any dispute between Ambraco and Vessel Interests had to be resolved in England. (USCA5 231-240).

Vessel Interests filed a motion to dismiss the third-party complaint, which was opposed by Pacorini. (USCA5 661). Ambraco also filed an opposition to Vessel Interests' motion to dismiss the third-party complaint in an attempt to re-urge its argument that England is an unfair forum. (Supp.Rec. USCA5 41).

On November 5, 2007, the District Court granted Vessel Interests' motion to dismiss the third-party complaint, finding that the Vessel Interests were not properly brought into the lawsuit by Pacorini as third-party defendants because they were already involved in the lawsuit. (Supp.Rec. USCA5 52) Thus, the Vessel Interests did not meet the criteria of a third-party defendant as defined by Rule 14(c); as a result, Pacorini's third-party demand and tender were improper. *Id.*

On May 24, 2009, the Fifth Circuit Court of Appeals reversed and remanded the district Court's ruling dismissing Pacorini's third-party demand, and affirmed the lower courts ruling dismissing Ambraco's suit filed in the Eastern District of Louisiana. Following the Fifth Circuit's decision, Ambraco filed a petition for panel rehearing, which was denied.

This Writ followed.

REASONS FOR DENYING AMBRACO'S PETITION

I. Ambraco Cannot Overcome the Strong Presumption in Favor of Enforcing the Forum Selection Clause in the Bills of Lading.

Federal law determines the enforceability of a forum selection clause. *Haynsworth v. The Corp.*, 121 F.2d 956, 962 (5th Cir. 1999). This Court has consistently held that forum selection clauses are presumptively valid. *Vimar Seguros Reaseguros v. M/V SKY REEFER*, 515 U.S. 518, 541 (1995) (enforcing a foreign forum arbitration clause); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (enforcing a Florida forum selection and choice of law clause in a form cruise ship ticket); *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (enforcing an English choice of law and forum clause); *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 35 (5th Cir. 1997) (choice of law and forum clauses are presumptively valid); *Laserdynamics, Inc. v. Acer Am. Corp.*, 209 F.R.D. 388, 391-92 (S.D. Tex. 2002) (dismissing claim pursuant to California forum selection clause). This Court in the *M/S BREMEN* case set out the factors to be considered in determining if a forum selection clause is valid and enforceable. These factors are:

- The choice of forum was made in an arm's length negotiation by experienced sophisticated businessmen.

- A freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, should be given full effect.

- The forum clause should be enforced unless the opposing party can clearly show that enforcement would be unreasonable and unjust, or that the clause is invalid for such reasons as fraud or overreaching.

- A contractual forum selection clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought.

- Even though a forum selection clause is freely negotiated and contravenes no important public policy of the forum, it may nevertheless be "unreasonable" and unenforceable if the chosen forum is seriously inconvenient for the trial of the action.

The Court's analysis here must therefore start with the premise that the forum selection clause in the governing bills of lading enjoys a presumption of validity. *See MIRA M/V*, 111 F.3d at 35. Moreover, Ambraco's lawsuit brought under Bossclip's bill of lading is a clear and unequivocal acceptance of the bills' terms and conditions, including the forum selection clause. *Id.* at 36-37 (argument that a bill of lading was an invalid contract of adhesion failed as the court held that party who had filed a lawsuit for damages under a bill of lading had accepted all the terms of the bill of lading, including the choice of law and forum clause).

Ambraco simply cannot overcome this strong presumption of validity because none of *BREMEN* factors that would militate against the presumption are

present in this case. It is undisputed that Ambraco is a sophisticated international commercial entity well versed in shipping transactions.[1] The forum selection clause did not result from fraud or overreaching. The terms of a negotiated bill of lading between two sophisticated international commercial entities cannot be said to be obtained by fraud or overreaching. *See, e.g., Carnival Cruise Lines*, 499 U.S. at 595 (this Court failed to find fraud or overreaching in a choice of law and forum clause contained in a non-negotiated form passenger cruise ticket – a contract of adhesion); *MIRA M/V*, 111 F.3d at 36-37. Moreover, Ambraco has made no allegations that the forum selection clause included in the applicable bills of lading was obtained through fraud or overreaching. *See, e.g., Haynsworth*, 121 F.3d at 963 (allegations of fraud and overreaching must be specific to the forum selection in order to invalidate it.).

II. Sky Reefer

Likewise, it cannot be maintained that the enforcement of the forum selection clause violates strong U.S. public policy. In *SKY REEFER*, this Court found unpersuasive an argument that enforcement of a forum selection clause calling for Japanese arbitrators to apply COGSA would violate U.S. policy concerns. 515 U.S. at 539-41. In the instant case, the forum selection clause is far less onerous; it merely calls for the High Court of Justice in London to resolve the dispute under the applicable bills of lading. It is well settled in our

1. Although Ambraco never disputed its status as a sophisticated international company, more information about its business can be viewed at its website, www.ambraco.com.

jurisprudence that England is recognized as a competent and fair forum. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-23, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33 (5th Cir. 1997); *Shell v. R.W. Sturge*, 55 F.3d 1227, 1229 (6th Cir. 1995); *Hugel v. Corporation of Lloyds*, 999 F.2d 206 (7th Cir. 1993). Ambraco therefore has both a forum and remedy available to provide redress. In fact, enforcing the forum selection at issue would promote the strong federal policy that presumes such clauses are valid and enforceable. *See M/V SKY REEFER*, 515 U.S. at 541; *MIRA M/V*, 111 F.3d at 35; *Laserdynamics*, 209 F.R.D. at 391-92.

The argument that enforcement of the forum selection clause would deny the Petitioners their day in court is lacking. Suit has already been filed by Ambraco and will be heard by the High Court of Justice in London, the proper forum as contemplated by the bill of lading. *See* M/S *BREMEN*, 407 U.S. at 8; *MIRA M/V*, 111 F.3d at 35; *Carnival Cruise Lines*, 499 U.S. at 595 (enforcement of a Florida forum clause that compelled Washington State residents to litigate their claims in Florida did not deny Appellants their day in court). Indeed, by filing an identical claim in London, under the exact same bills of lading and against the same defendants, the Petitioners have tacitly acknowledged that the matter should be heard in London in accordance with the forum selection clause.

Ambraco should not be allowed to abandon contractual terms simply because it now finds these terms to be inconvenient. Otherwise, the validity of the contract would be undermined, and this would clearly

be contrary to public policy. Moreover, this would result in prejudice to the Vessel Interests and have a chilling effect on the shipping industry, which now relies on the ample jurisprudence giving force to forum selection clauses. Even assuming that the Petitioners' remedies are less exhaustive in the foreign forum, which is disputed, that is the forum they have chosen, and they cannot now avoid enforcement of a common forum selection clause.

There is overwhelming jurisprudence to support the validity of the forum selection clause within the controlling bills of lading. The Petitioners themselves acknowledge the strength of such presumption and the heavy burden of proving such clauses unreasonable, and they completely fail to identify any fraud, coercion, and/or overreaching. Therefore, the Fifth Circuit was correct in affirming the District Court's ruling that the applicable forum selection clause is valid and enforceable.

III. The Opinions of Ambraco's English Solicitor are Without Merit.

Despite the weight of the law against its position, Ambraco attempts to have the forum selection clause declared null and void by this Court. To do this, Ambraco relies on the affidavit of its English solicitor, Mr. Lloyd, who opines that under English law there is a risk that Ambraco may not be able to recover against Bossclip or Dockendale as carrier and that Ambraco may not be able to proceed against the CLIPPER FAITH, *in rem*, because the vessel is not within the jurisdiction of the English court. Both opinions are without merit.

First, in both opinions, Mr. Lloyd only speaks in terms of "risks." All litigation, however, contains risk. If that were the standard of invalidating forum selection clauses, then no forum selection clause would ever pass muster. Indeed, in spite of his opinion that Bossclip and Dockendale may not be considered a carrier under English law, Mr. Lloyd, when filing his claim in the High Court of Justice, named Bossclip and Dockendale, as well as all other defendants here, as defendants. Clearly, Mr. Lloyd believes he may have some chance of success of pursuing these defendants.

In any event, Mr. Lloyd opines on the English court's application of English law. In this case, however, the Clause Paramount clearly stipulates that U.S. COGSA would be applicable to this particular carrier as it was a carriage to the United States. Under COGSA, a carrier includes the vessel owner or the charterer who entered into the contract of carriage. 46 USC § 30701. Courts have long recognized that under COGSA, there may well be more than one carrier. Reilly, *The Identity of the Carrier*, 25 Tul.Mar.L.J 505 (2001). Thus, under COGSA both Bossclip, as the issuer of the bill of lading, and Faith, as the owner of the CLIPPER FAITH, may face potential liability. Dockendale's potential liability would depend on its role, but if it was the actual operator of the vessel, it also would arguably be a carrier. English courts applying COGSA should reach this same result, thus depriving Ambraco of nothing.

Although Mr. Lloyd does acknowledge the Clause Paramount in the bills of lading, he pointedly does not address the issue of whether the English court would apply COGSA as stipulated in that clause. Nevertheless,

there is English jurisprudence which indicates that the English court would indeed apply COGSA and its concept of multiple carriers when required to do so by the applicable bills of lading. See, e.g., *Scruttons, Ltd. v. Midland Silicones*, 2 Lloyds Rep. 365 (1962), 1962 W.L. 21259 (HL) (1962) (the English House of Lords, in applying U.S. COGSA, considered whether the definition of carrier also included stevedores).

Mr. Lloyd also acknowledges the definition of "carrier" under the Bossclip bills, but does not expound on this. The definition of carrier under the bills can be interpreted to include multiple parties: the "carrier as stipulated as page 2 on this bill of lading, and ... the registered owner of the vessel." The conjunctive "and" would indicate that more than one carrier is envisioned. In this case, it is slightly confusing as to what the reference to "page 2" means, but reasonably assuming that it means the reverse side of the bill, then the definition of carrier under the terms of the bill would be Bossclip as the issuer of the bill and Faith as the registered owner of the vessel. Mr. Lloyd does not address how the English court would treat this definition, but assuming, as Mr. Lloyd says, that the English court would give meaning to all of the contract terms, it is illogical to assume that the court would not find that multiple carriers are implicated.

Moreover, even if Ambraco's argument is assumed to be correct, it is difficult to see how Ambraco would be prejudiced. Ambraco admits that it would have a valid cause of action against Faith as the owner of the CLIPPER FAITH. Faith, in turn, would have a valid indemnification claim against Bossclip and/or

Dockendale. Through this mechanism, Ambraco would still be made completely whole, and all parties would pay their just and fair share of any judgment or settlement.

Mr. Lloyd's second opinion is even more curious than his first. Mr. Lloyd states that Ambraco may lose its *in rem* claim because the vessel, CLIPPER FAITH, is not within the jurisdiction of the English court. Mr. Lloyd fails to explain why it matters that the vessel would not be in English waters when Ambraco already holds a valid letter of undertaking in the amount of $2,000,000.00 as security for its claims. As the letter of undertaking stands in place of the *res*, or the vessel, it matters little that the CLIPPER FAITH is not subject to arrest or attachment in England.

It should also be noted, again, that Mr. Lloyd only speaks of the risk that the CLIPPER FAITH will not be in English waters. The CLIPPER FAITH is an ocean going vessel and has at times called on ports all over the world. Not even the vessel's owner could say definitively that she will not call on English ports as the vessel's future charterers may indeed direct her there. Clearly, Mr. Lloyd's speculation as to the future movements of the CLIPPER FAITH is a woefully inadequate tool used by Ambraco in its attempt to dismantle the foreign selection clause.

As noted above, there is a plethora of jurisprudence recognizing the adequacy, fairness and impartiality of England as an acceptable forum in maritime and, specifically, COGSA matters. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-23, 92 S.Ct. 1907, 32 L.Ed.2d

513 (1972); *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33 (5th Cir. 1997); *Shell v. R.W. Sturge*, 55 F.3d 1227, 1229 (6th Cir. 1995); *Hugel v. Corporation of Lloyds*, 999 F.2d 206 (7th Cir. 1993). This case is no different. It would be unprecedented in this Court to find the English forum inadequate.

IV. The *Gertrude Oldendorf* Holding is Distinguishable and Should Not be Considered.

To bolster its weak argument that England would be an inadequate forum, Ambraco uses the lone case that can be found that is even remotely in support, a decision by the Southern District Court of New York in *Cent. National-Gottesman, Inc. v. M/V GERTRUDE OLDENDORF*, 204 F.Supp 2d 675 (S.D.N.Y. 2002). In *Gertrude Oldendorf*, the district court held that a forum selection clause mandating that disputes be decided in London according to English law was not enforceable due to the fact that there was a strong likelihood in that case of the English court interpreting English law so as to insulate the time charterer from liability, and there would be no subsequent opportunity for a United States court to review the English court's judgment. Not only is this New York district court case of no consequence here, it is easily distinguishable on both its facts and the law.

First, although it need not be stated, this Court is not bound by the decision of a lower court, especially in an area of law where there exists ample authority within this Court. The ruling of the *Gertrude Oldendorf* case could be rejected without consideration on that basis alone.

Nevertheless, even when considered, it is clear that the *Gertrude Oldendorf*'s reasoning must be rejected here. In *Gertrude Oldendorf*, the court denied the defendant's motion to dismiss for *forum non conveniens* due to clause 19 of the controlling bill of lading. That clause stated:

> The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein and it is therefore agreed that said Shipowner only shall be liable for any breach or nonperformance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailes [sic]of the goods shipped hereunder, all limitations of and exonerations from liability provided for by law or by this Bill of Lading shall be available to such other.
>
> *It is further understood and agreed that as the line company or agents who has [sic] executed this bill of lading for and on behalf of the master is not a principle in the transaction, said line company or agents shall not be under any liability arising out of this contract of carriage, nor as carrier nor bailee of the goods.* (emphasis added)

Gertrude Oldendorf, 204 F.Supp at 680.

The emphasized language in clause 19 clearly was designed to insulate the line company, or charterer, from any liability. As discussed by the district court, this clause would be enforceable under English law, but would not be enforceable under COGSA as it would be a lessening of the carrier's liability prohibited by COGSA. On that basis, the court decided that England would be an inadequate forum and denied the motion to dismiss presented by the defendant.

The most glaring difference between the *Gertrude Oldendorf* case and the present case is that no where in our controlling bills of lading does language even remotely similar to the *Gertrude Oldendorf's* clause 19 appear. Thus, the entire reason for the New York court's decision is absent in this case. Moreover, the bill of lading in the *Gertrude Oldendorf* case did not contain a Clause Paramount that stipulated U.S. COGSA would apply to the carriage. Here, as discussed above, the English court is directed by the bills of lading to apply COGSA to this dispute between Ambraco and the Vessel Interests. Finally, the court in *Gertrude Oldendorf* factored into its decision that it would not have an opportunity to review the foreign court's decision and ensure that the decision comported with U.S. public policy. Here, the District Court did indeed retain jurisdiction in order to ensure that the English court's decision is not contrary to public policy.

For all the reasons set out above, the New York district court's decision in the *Gertrude Oldendorf* case is clearly not applicable here. Thus, Ambraco loses the lone decision that it had to support its shaky position, and under the crushing weight of the binding authority, Ambraco's arguments must crumble.

CONCLUSION

Ambraco's Petition for a Writ of Certiorari should be denied due to the fact that the forum selection clause contained in the applicable bills of lading is supported by overwhelming jurisprudence and enjoys a presumption of validity that cannot be overcome by Ambraco.

Respectfully submitted,

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